7 *Official Opinions of the Compliance Board* 195 (2011)

Public Bodies – Generally – Private corporation solely owned by public body – Additional facts needed

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Exceptions Permitting Closed Session – Investment of public funds, §10-508(a)(5) – Discussion of donation to another entity: outside exception. – Discussion of corporate governance of corporation owed by public body: outside exception.

Minutes – Generally – Sealing and unsealing

June 27, 2011

Complainant:
Craig O'Donnell

Respondents:
Maryland Transportation Authority
Canton Development Company
Canton Railroad Company
Freestate Logistics Services, Inc.

We have considered the allegations of Mr. Craig O'Donnell ("Complainant") that Canton Development Company ("CDC"), which is wholly owned by the Maryland Transportation Authority ("MDTA"), is a public body and has violated the Open Meetings Act ("the Act") by not conducting open meetings. He alleges similar violations by two corporations that are wholly-owned subsidiaries of CDC. He further alleges that MDTA violated the Act by discussing certain matters in a closed meeting on May 30, 2007 and refusing to unseal minutes of any of the closed sessions it held in years 2007-2010.

For the reasons stated below, we are unable to resolve the question of whether CDC and its subsidiaries are "public bodies" under the Act. We conclude that MDTA violated the Act by closing its May 30, 2007 meeting to discuss matters not falling within the exception it claimed. The Act requires MDTA to unseal the minutes of meetings involving investments that it has now made or the marketing of public securities that it has now issued.

I

Discussion

A. *Whether the Canton entities are "public bodies"*

Complainant alleges that CDC and its subsidiaries, Canton Railroad Company and Freestate Logistic Services, Inc., are wholly owned and controlled by MDTA and are thus "public bodies" subject to the Act. He states that, as far as he could ascertain, all three companies have the same directors, all of whom are elected by MDTA in its capacity as the CDC's sole shareholder. He notes that MDTA member Walter E. Woodford serves also as Chairman of the CDC Board.

MDTA and CDC respond that CDC and its subsidiaries are private, for-profit corporations. MDTA, responding on its own behalf "in its capacity as the shareholder of [CDC]," and not on behalf of the companies, explains that "the Canton Railroad Company was chartered in 1906 [,] Canton Development Company was originally formed in 1982, and Freestate ... was formed in 2006." MDTA states that it is CDC's "sole stockholder." CDC's president, Mr. John C. Magness, provided us with information on the incorporation and governance of the companies. The three companies have a "Joint Board of Directors"; Mr. Woodford is its Chairman. CDC's by-laws provide that the stockholders elect CDC's board members, who need not themselves be stockholders, that the stockholders may remove a director "with or without cause" and elect a replacement, and that stockholders may call special meetings for any purpose at any time. The companies explain that the Directors are "interviewed by a committee of the Board and a recommendation is made to the Maryland Transportation Authority which then approves or disapproves them as the representative of the shareholder."

CDC and MDTA have expressed varying perspectives on whether the companies serve public functions. CDC states:

> Canton Development Company and its subsidiaries are private for-profit corporations that do not conduct "public business" but are involved in providing traditional rail and logistic services to our customers. In fact we are exactly like more than 500 short line railroads in the United States in how we operate and are organized from a corporate structure. We provide no services that are considered for the public good, and we generate our own revenues from the

> service we provide and pay taxes just as any corporation would.

Similarly, MDTA describes itself in its response as "merely the shareholder of the [CDC]." However, MDTA's minutes of the May 30, 2007 meeting state: "Members want to continue to operate the railroad primarily as a service to the Port and to provide the benefit to the Port." And, MDTA's June 30, 2006 Financial Statement states:

> In 1987, the Authority acquired 100% of Canton Development Corporation (CDC) for $1,625,000. CDC owns 100% of the Canton Railroad Company (CRC). The Authority accounts for CDC on the cost basis. The investment in CDC is accounted for at cost as CDC was purchased for the benefit of the State of Maryland's economy. Ownership of CDC and CRC allows the Authority and the Maryland Port Authority [sic] to assure access of freight into and out of the Seagirt Marine Terminal.[1] ...

Similarly, the Authority's 2007 Financial Statement states:

> In 1987, the Authority acquired 100% of Canton Development Corporation (CDC) for $1,625,000. CDC owns 100% of the Canton Railroad Company (CRC). The Authority purchased the entity to ensure control of the rail rights which allows the Authority and the Maryland Port Authority [sic] to assure access of freight into and out of the Seagirt Marine Terminal. ...

More recently, MDTA's 2010 Strategic Plan refers to MDTA's ownership of "Canton Railroad Company, which provides short-line rail access to Seagirt" under this "Goal": "Strategic Financing: Invest, Finance and Build New Transportation Facilities with the Maryland Department of Transportation and Other Agencies to Meet Maryland's Transportation Needs." Finally, MDTA's website states:

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[1] According to the Authority's website, "The Authority funded construction of the Seagirt Marine Terminal, which opened in 1990. The terminal was owned by the Authority and operated by the Maryland Port Administration (MPA) until November, 2009, when the Authority transferred ownership of Seagirt to MPA."

> Acting on behalf of the Maryland Department of Transportation (MDOT), the Authority finances and builds new transportation facilities to meet Maryland's transportation needs. ***
>
> Some of the Authority's ventures include: ***
>
> 1. The Canton Railroad Company, owned by the Authority since 1987, operates along 16 miles of track and provides railroad access to the Seagirt Marine Terminal. The Canton Railroad Company has served the Port of Baltimore and southeast Baltimore City industries for 95 years. It contracts with Conrail and CSX Transportation....

There is no question that CDC was originally incorporated as a private, not public, entity. Now, however, there appears to be a hybrid situation in which a public government agency owns and controls an entity created and operated as a private, for-profit, corporation in order to assure access to a marine terminal which the agency once owned but has since transferred to another public entity.[2] Public ownership of the corporation is thus apparently viewed not simply as a passive investment, but as a part of the agency's strategy for carrying out its function.

To determine whether the CDC is a "public body" for purposes of the Open Meetings Act, we start with the Act's three definitions of a "public body." *See* SG § 10-502(h). Where, as here, the entity in question was privately-incorporated, we may also look to other considerations. *See, e.g., City of Baltimore Development Corp. v. Carmel Realty Associates*, 395 Md. 299, 910 A.2d 406 (2006).

An entity meets the Act's first definition of a "public body" if the entity was created by a law or other legal instrument. SG § 10-502(h)(1). CDC was not so created. An entity meets the second definition if it is a board or other body appointed by the Governor, a chief executive authority of a local government, or officials subject to their direction. SG § 10-502(h)(2)(i). The CDC Board is not so appointed.

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[2] *See* footnote 1.

Under the third definition, an entity is a public body if it is (1) a multimember board appointed by "an entity in the Executive branch of State government, the members of which are appointed by the Governor, and that otherwise meets the definition of a public body under this subsection," and (2) composed of at least two members "who are not members of the appointing entity or employed by the State." SG § 10-502(h)(2)(ii).

The CDC Board of Directors fits the literal terms of the third definition. It is a "board," composed of multiple members appointed by the MDTA Board, which itself is "an entity in the Executive branch of State government."[3] MDTA is a public body by virtue of its creation by § 4-201 of the Transportation Article ("TA"), and its members are appointed by the Governor. MDTA suggests that its "election" of a CDC board member is not the same as the "appointment" of a member. However, both acts, when performed by a public body, would be accomplished by a vote, and we do not perceive a material distinction. Finally, more than two of CDC's board members are neither members of the appointing entity nor state employees. A straightforward application of SG § 10-502(h)(2)(ii) would thus seem to yield the result that the CDC Board is a "public body."

Here, however, our analysis does not stop with the application of the Act's definitions. Where an entity created as a private entity nonetheless meets the plain language of the Act, the Court of Appeals has indicated that it may be appropriate to examine on a broader level whether treating it as a public body comports with legislative intent. *See Carmel Realty Associates*, *supra*, 395 Md. at 327. We pursue that broader approach here, because a number of CDC's and its subsidiaries' traits, particularly the operation of these companies as for-profit enterprises, make the characterization of them as "public bodies" seem odd. For guidance, we look to the two cases in which the Maryland courts determined that entities not created as a government "board" or "commission" nonetheless were "public bodies" under the Act in light of their traits. *See City of Baltimore Development Corp. v. Carmel Realty Associates*, 395 Md. 299, 910 A.2d 406 (2006)*; Andy's Ice Cream v. City of Salisbury*, 125 Md App. 125, 724 A.2d 717 (1999). We also look to our own opinion that a particular privately-incorporated entity was not a public body. *See* 3 *OMCB Opinions* 284 (2003). All were decided before the third definition of "public body" was enacted, and the guidance is limited in light of the novel facts here.

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[3] *See Md. Transp. Auth. v. King*, 369 Md. 274, 276 (2002) (stating, "The Maryland Transportation Authority is a unit of the Maryland Department of Transportation, which is a cabinet-level principal department in the executive branch of the state government....").

In *Carmel Realty*, the Court of Appeals found that the Baltimore Development Corporation ("BDC"), although incorporated as a private entity, met the criteria in the second definition of a "public body." The Court then addressed BDC's argument that the "General Assembly never intended to apply [the Act] to entities like the BDC." *Id.* at 327. The Court charted BDC's functions under three headings: "Purely Public Function," "Public and Private Function," and "Purely Private Function." The Court noted the lack of any entry in the "Purely Private" column and described the chart as "a powerful visual aid demonstrating the extent to which the BDC has been able to cloak the business of the Citizens of the City of Baltimore behind the veil of a supposedly private corporation." *Id.* at 329. The Court concluded that requiring BDC to open its deliberative process to the public would be "consistent with the purposes of the Open Meetings Act." *Id.* at 331.

In *Andy's Ice Cream v. City of Salisbury*, 125 Md. App. 125, 724 A.2d 717 (1999), the court held that the Salisbury Zoo Commission, incorporated as a private, non-stock corporation, was a public body because it had "the *functional status* of a government board." *Id.*, 125 Md. App. at 153 (emphasis added). That entity had been incorporated by the City solicitor, operated under a budget subject to City approval, and was directed by a board appointed by the Mayor and City Council. *Id*. The court stated:

> To permit the government to operate outside of the view of the public through private corporations ... is an invitation to great mischief, which the Open Meetings Act seeks to curtail. Therefore, the focus of review is transactional in the sense that the analysis requires a determination of the extent to which the controlled entity actually carries on public business. A private corporate form alone does not insure that the entity functions as a private corporation. When a private corporation is organized under government control and operated to carry on public business, it is acting, at least, in a quasi-governmental way. When it does, it is unreasonable to conclude that such an entity can use the private corporate form as a parasol to avoid the statutorily-imposed sunshine of the Open Meetings Act.

Id. at 154-55.

Here, unlike the Baltimore Development Corporation or Salisbury Zoo Commission, CDC was not originally organized under government control, and there is no indication that CDC has made any effort to "cloak" public business behind any sort of "veil." On the other hand, CDC is now under government control, and the controlling government entity includes it among the activities that entity conducts "to meet Maryland's transportation needs" – a public function. Still, were we to draw a chart like the one in *Carmel Realty*, the "purely private" column might include a number of activities not falling within the public functions of the MDTA. [4] The cases on when a privately-created entity is a "public body" do not yield a clear conclusion, and we turn to our opinions on when a privately-created entity is just that.

We have twice concluded that the Baltimore Area Convention and Visitors Association, Inc. ("BACVA") was a private entity, despite the fact that it met the second definition of "public body" by virtue of the Mayor's power to appoint its board. *See* 3 *OMCB Opinions* 284 (2003); 1 *OMCB Opinions* 197 (1996). In 2003, citing *Andy's Ice Cream, supra*, 125 Md. App. 125, we stated that "we may not limit our analysis to the origins of an entity, for the governing body of an originally private entity performing a governmental function could be transformed into a 'public body' ... subject to the ... Act if a sufficient level of governmental control had resulted." 3 *OMCB Opinions* at 291. We found "key differences" between BACVA and the Salisbury Zoo Commission. We noted that the City of Salisbury had "explicit control" over "matters of fundamental corporate governance," "did not have to rely on the good will of the [Zoo Commission] board to achieve [the City's] objectives," and "had the authority to dissolve the Zoo Commission at will," all with the result that the Zoo Commissioners "could not possibly act with genuine independence." *Id.* at 291-92. In contrast, we stated, the BACVA board had authority over corporate governance and was "given perpetual succession." *Id*. BACVA's continuance was not "at the sole discretion of the City," and it therefore was not a "public body." *Id*.

The circumstances we found key when determining that BACVA was a private entity are not present here. Here, as was not the case with BACVA, the governmental entity has control over fundamental corporate governance: CDC's by-laws give the stockholder "the power and authority to amend, alter, or repeal all or any provision of these by-laws," whether at a special meeting called by the stockholder or at the annual meeting. Further, the CDC directors may not undo changes made by the stockholders under that provision before the next stockholder's meeting. MDTA may thus repeal the by-law provision which provides that the directors are to manage the "property, business and affairs of the Corporation." MDTA not only appoints the CDC board, but also

[4] One possible example is the switching operation conducted by Freestate.

may remove any director at any time. MDTA may inspect the books, and CDC's wish to issue more stock apparently required MDTA's consent. This level of control, especially viewed in conjunction with MDTA's statement that it acquired CDC to assure control over rail access to Seagirt, brings CDC closer to the Salisbury Zoo Commission, found by the court to function as "an extension or sub-agency of the City government," than to BACVA.

A conclusion that CDC is a "public body" for purposes of the Act would comport with the language of the Act and our opinions on the question. Nonetheless, the circumstance of a government entity owning and controlling a for-profit corporation is novel, especially when the government entity bought the corporation to assure access to a facility the government entity no longer owns or operates. In these circumstances, we believe that a court faced with the question would undertake the *Carmel Realty* analysis by sorting the entity's various functions as public, private, or both and then weighing the results. This is where we hit a dead end. We are not equipped, either in this case or generally, to gather and determine facts in the level of detail needed for such an analysis, whether for CDC or for its two subsidiaries. *See* 1 *OMCB Opinions* 101, 102 (1994) (stating that the Compliance Board "is not an adjudicatory body with compulsory process or other tools for conducting a factual inquiry").

As we are permitted to do by SG § 10-502.5(f)(2), we therefore state that we are unable to resolve this aspect of the complaint. We caution, however, that a stockholders' meeting comprised of a quorum of the MDTA as stockholder would be subject to the Act because that quorum would be discussing the affairs of the entity it controls for public purposes.

B. The May 30, 2007 closed meeting

Complainant alleges that MDTA violated the Act on May 30, 2007 by closing a meeting to discuss and take action on two matters that should have been discussed publicly. According to the MDTA's minutes of the open session it held that day, the members of the MDTA voted to move into closed session "pursuant to Section 10-508(a) of the State Government Article ["SG"] of the Annotated Code of Maryland: (5) to consider the investment of public funds (*Pride of Baltimore* contribution and Canton Development Company investment) ...." The open-session minutes further state:

The following actions were taken during the Closed Session:

- *Pride of Baltimore II* Contribution

  Upon motion by Ms. Rieg and seconded by Mr. Woodford, members unanimously voted to contribute $164,000 to the *Pride of Baltimore II* for fiscal year 2007 by reducing the amount payable by the Maryland Port Administration to the Authority under the Seagirt Marine Terminal Operating Agreement by that amount.

- Canton Development Company Investment

  Upon motion by Ms. Hoblitzell and seconded by Ms. Affleck Bauer, members unanimously consented to the articles of amendment by the Canton Development Company authorizing additional shares by the Canton Development Company and delegated the authority to the Executive Secretary to execute the consent document. Members want to continue to operate the railroad primarily as a service to the Port and to provide the benefit to the Port. This investment will be taken to the Board of Public Works.

The minutes of the open session then state: "Upon motion ..., members unanimously ratified the above-recorded actions taken in Closed Session, the Acting Chair concurring."

Under SG § 10-508 (a)(5), a public body may meet in closed session or adjourn an open session to a closed session to "consider the investment of public funds...." While we have instructed generally that the discussion must be "sufficiently related to a concrete investment possibility as to justify invoking the exception," 4 *OMCB Opinions* 114, 117 (2005), we have not addressed the question of whether "investment" includes either a "contribution" or the consideration of whether a company owned by the public body may issue stock so that the public body may buy it. We begin with the "contribution" discussion.

1. The "*Pride of Baltimore II* Contribution"

MDTA asserts without elaboration that the discussion about the "contribution" was a discussion about "an investment." At first blush, it would seem clear that a "contribution" to a private entity qualifying as a § 501(c)(3)

organization under the Internal Revenue Code is not the same thing as an "investment" of public funds. Nonetheless, in the interest of not drawing a hasty conclusion, we shall look for circumstances which might muddy those waters.

First, although "investment of public funds" connotes an investment made in the hopes of a monetary reward, one could interpret "investment" to include the use of money in the hopes of other forms of reward, such as publicity. In this regard, the *Pride of Baltimore*, and its successor, the *Pride of Baltimore II*, were built to promote Baltimore, including its ports, and, by extension, the Seagirt Marine Terminal, then owned by MDTA. So, under an expansive reading of "investment," one could view MDTA's waiver of lease payments from the Port Administration as an "investment." SG § 10-508(c), however, does not permit the exceptions in SG § 10-508 (a) to be read expansively; to the contrary, it requires us to construe them "strictly...in favor of open meetings." Furthermore, permitting public bodies to discuss in closed sessions their voluntary contributions of public funds would not serve any purpose recognized by the Act. Other exceptions bearing on a public body's own financial matters, such as procurement, collective bargaining, and land acquisition, protect the public body against the effect of public disclosure on its ability to negotiate a favorable price. That consideration is not present where, as here, the transfer of funds is gratuitous.

We conclude that broadly construing "investment" to include voluntary contributions, for whatever reason, would neither serve a need for non-disclosure nor conform to SG § 10-508(c). In our view, the word "investment" does not include a public body's expenditures on either charitable contributions or promotional activities. In any event, we note that MDTA made its "contribution" not by paying the *Pride* entity directly, but rather by "reducing the amount payable by the Maryland Port Administration to [MDTA] under the Seagirt Marine Terminal Operating Agreement by that amount." The discussion thus apparently involved both the contribution of certain funds and a waiver of rights under the operating agreement. The investment exception applies to the discussion of a concrete investment possibility; it does not apply to the public body's discussion of the financing mechanism for contributing to a promotional endeavor. We conclude that MDTA violated the Act by discussing this "contribution" in a closed session.

2. The "Canton Development Company Investment"

A public body's authorization to its wholly-owned company to issue additional shares involves corporate financing and governance, a topic not listed in any exception under SG § 10-508(a). Here, MDTA apparently authorized CDC to issue additional shares so that MDTA itself could buy

them. Although a discussion of whether to invest further public funds in CDC could theoretically fall within the investment exception, MDTA's minutes show that the May 30, 2007 meeting involved an adoption of CDC's "articles of amendment." As discussed above, MDTA's control over CDC and its view of CDC's role in meeting Maryland's transportation needs demonstrate that the relationship between MDTA and CDC cannot be analogized to that between, for instance, a public pension fund and the corporations in which it invests passively and votes shares. We find that MDTA violated the Act by discussing the corporate governance of CDC in a session closed under the "investment" exception.

3. *Sealed and unsealed minutes*

In his complaint, Complainant alleges that MDTA has violated the Act by neither unsealing the minutes of the May 30, 2007 meeting nor disclosing in other minutes the actual investment in CDC made pursuant to the discussion at that meeting. MDTA responds that it has unsealed the minutes of its May 30, 2007 meeting, that they are available at its office, and that the Act requires the unsealing of minutes "when the public body invests the funds," not when the investment is approved. Complainant rejoins by alleging "some 25 closed sessions in 2007-2009 where [SG §] 10-508(a) 5 and/or 6 were invoked." For each session, Complainant states, "the public has never been told (1) when [the minutes were] "unsealed" and how; (2) dates on which "investments were made" or "bonds were sold" triggering the statutory requirement." Complainant's list of closed meetings includes meetings closed in 2007 under SG § 10-508(a) (5) and (6) to discuss "ICC funding, financial overview and forecast," and, under SG § 10-508(a) (6), to discuss "Toll Revenue Bonds."

We have been given no reason to disbelieve MDTA's assertion that the May 30, 2007 minutes are now unsealed, and no reason to disbelieve Complainant's understanding on February 3, 2011, when he filed his complaint, that the minutes were still sealed. We also have no reason to disbelieve Complainant's understanding on April 1, 2011, when he filed his rejoinder, that the minutes were still sealed for the 26 other meetings on his list, because MDTA has not disputed his summary. Whether those minutes remain unsealed is a fact we do not know. We thus do not know whether the problem here lies with a failure to unseal minutes of closed sessions, a failure to provide access, or, as is quite possible, a simple miscommunication between this public body and this Complainant. In the hopes that we might provide some relief to these parties in their ongoing difficulties,[5] we provide the following guidance on the unsealing of minutes of meetings closed to either

[5] *See* 7 *OMCB Opinions* 30 (2010), 7 *OMCB Opinions* 64 (2010), and 7 *OMCB Opinions* 117 (2011).

"consider the investment of public funds," as permitted by SG § 10-508 (a)(5), or "consider the marketing of public securities,"as permitted by SG § 10-508 (a)(6).

SG § 10-509 (c) (3) permits a public body to seal the minutes and any tape recording of a closed session and shield them from public inspection, except as provided in SG § 10-509 (c) (4). Paragraph (c)(4) requires that minutes be unsealed in some circumstances and allows unsealing in others:

> The minutes and any tape recording shall be unsealed and open to inspection as follows:
>
> (i) for a meeting closed under § 10-508 (a)(5) of this subtitle, when the public body invests the funds;
>
> (ii) for a meeting closed under § 10-508 (a)(6) of this subtitle, when the public securities being discussed have been marketed;
>
> (iii) on request of a person or on the public body's own initiative, if a majority of the members of the public body present and voting vote in favor of unsealing the minutes and any tape recording.

As applied to the MDTA's May 30, 2007 consideration of a further "investment" in its wholly-owned company, had that discussion involved an investment, SG § 10-509 (c) (4) would have required unsealing when that investment was made. As applied to the MDTA's consideration of bond issuances in meetings closed under the public securities exception, SG § 10-509 (c) (4) required unsealing when the securities had been marketed. In short, when the need for the secrecy – namely, the possible effect on the price of the investment or public securities – has ended, the minutes must be unsealed and open to inspection. For example, if the toll revenue bonds considered at a meeting in 2007 were issued, those minutes should have been unsealed promptly after the issuance.

We have stated that a public body's consideration of a motion to open the minutes of sessions closed under the other exceptions is an administrative function to which the Act does not apply. 5 *OMCB Opinions* 105, 115 (2007). Complainant is thus not entitled to observe MDTA's deliberations on his request that minutes be unsealed. However, if the public body recesses an open session to discuss this administrative matter, "the minutes for the public

body's next meeting shall include ... a phrase or sentence identifying the subject matter discussed at the administrative function meeting." SG § 10-503(c).

II

Conclusion

We are unable to resolve the complaint against CDC and its subsidiaries. We conclude that MDTA has violated the Act with respect to the closing of the May 30, 2007 meeting to discuss matters beyond the scope of the claimed exception. If there remain any state-sealed minutes for meetings involving the discussion of investments which MDTA has since made or the marketing of securities which it has since issued, MDTA has violated the Act.

In closing, we note that many allegations involve events which occurred several years ago, and we are encouraged by the fact that MDTA now posts its minutes on its website. Nonetheless, the General Assembly has not imposed any statute of limitations on the time in which complaints must be filed, and we cannot disregard past violations brought to our attention. Still, if those violations have in good faith been cured, as by, for instance, the unsealing of minutes, we would likely find a further "specific analysis ... moot and therefore pointless." See 3 *OMCB Opinions* 140, 142 (2001).

OPEN MEETINGS COMPLIANCE BOARD

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